SUPREME COURT, U.S.
FILED

IN THE

Supreme Court of the United States

October Term, 1970

No. 1597

CONTINENTAL BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	7
A. The Commission's Refusal to Consider the Licensee's Program Performance is Discriminatory	9
B. The Commission's Refusal to Consider Licensee's Corrective Measures is Discriminatory	15
APPENDICES	
Appendix A Decision Below	A-1
Appendix B Judgment Below	
Appendix C Denial of Petition for Rehearing	
Appendix D Constitutional Provisions	

CITATIONS

Cases:

Continental Broadcasting, Inc. v. Federal Communications Commission, 15 FCC 2d 120 (1968)	5

Page

Continental Broadcasting, Inc.,
17 FCC 2d 485 (1969) 6

Eleven Ten Broadcasting Corp.,
33 FCC 92 at 97 10

Federal Communications Commission v. WOKO, Inc.,
329 U.S. 223, 228 (1946) 6

General Electric Co.,
2 Pike and Fischer Radio Regulation
2d 1038 (1964) 12, 17

Greater Boston Television Corp. v. Federal Communications Commission,
____ F.2d ____ , _____, 20 Pike and
Fischer Radio Regulations 2d 2052,
2065 (1970) 7, 8

Hall v. Federal Communications Commission,
103 U.S. App. D.C. 248,
257 F.2d 626, 629 (1958) 11

Howard W. Davis,
27 FCC 2d 102 (1971) 19

Immaculate Conception Church of Los Angeles v. FCC,
116 U.S. App. D.C. 73,
320 F.2d 795, cert. denied,
375 U.S. 904 (1963) 10

Lamar Life Broadcasting Company,
14 FCC 2d 431, 13 RR 2d 769 (1968)
reversed on other grounds, *Office of Communications of the United Church of Christ v. Federal Communications Commission*, 138 U.S.
App. D.C. 112, 425 F.2d 543, 16 Pike and
Fischer Radio Regulation 2d 2095 (1969) 17

Panama City Broadcasting Co. (WDLP),
9 FCC 208 (1942) 18, 19

Page

Ralph J. Silkwood,
FCC 69 R-310 13

Skinner v. Oklahoma,
316 U.S. 535, 541 (1942) 21

The Northern Corporation,
15 FCC 60, 5 RR 673 (1950) 12

Trans-America Broadcasting Corporation,
20 Pike and Fischer Radio Regulation
2d 1095 (1970) 14

Westinghouse Broadcasting Company,
22 Pike and Fischer Radio Regulation 1023
(1962) 11, 16

Yick Wo v. Hopkins,
118 U.S. 356, 373-74 (1886) 7, 20

United States Constitution:

Fifth Amendment 2, 3, 20

Fourteen Amendment 2, 3, 20

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CONTINENTAL BROADCASTING, INC.,
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Continental Broadcasting, Inc. (Petitioner) prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in which the Court of Appeals affirmed the decision of the Federal Communications Commission denying Petitioner's application for renewal of its license to operate Radio Station WNJR, Newark, New Jersey.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) has not yet been officially reported. It is unofficially reported at 20 Pike and Fischer Radio Regulation 2d 2126 (1971).

JURISDICTION

The judgment of the Court of Appeals was entered January 5, 1971 (Appendix B), and a Petition for Rehearing was denied by the Court on February 10, 1971 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 2101 and 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals and the Federal Communications Commission denied Petitioner due process of law, and deprived it of its constitutional right of equal protection under law, by applying to Petitioner criteria and principles of judgment different from those which the Commission and the Court regularly apply to other applicants similarly situated.

CONSTITUTIONAL PROVISIONS

The pertinent sections of Amendments V and XIV to the Constitution of the United States are set out in Appendix D.

STATEMENT

This Petition seeks review of a decision by the United States Court of Appeals for the District of Columbia Circuit affirming the Federal Communications Commission's denial of Petitioner's application for renewal of its license to operate Radio Station WNJR, Newark, New Jersey. Petitioner will demonstrate that the Court and the Commission arbitrarily and erroneously used standards of judgment in assessing Petitioner's application different from those used in the past (and being used to this very day) by the Commission to

assess qualifications of other Commission licensees similarly situated. The failure of the Court and the Commission to apply the same standards of judgment to Petitioner as have traditionally been applied to other licensees, improperly and illegally discriminated against Petitioner and has denied it the equal protection of law to which it is entitled under constitutional guarantees embodied in the Fifth and Fourteenth Amendments.

Station WNJR has been licensed to and operated by Petitioner for over 16 years. Its primary responsibility has been to serve the broadcast needs of the black population of Newark, New Jersey and environs, and, indeed, it was one of the first broadcast stations in the United States to acknowledge the singular need of black citizens for radio service, and to undertake to fulfill those needs. Throughout the entire record of its stewardship, as the Commission conceded, no question has been raised as to the manner in which the station has been meeting its public programming responsibilities, nor has the Commission ever raised any question concerning the adequacy or sufficiency of the station's broadcast performance. The proceedings surrounding Petitioner's application for renewal of its license have related solely to internal station affairs, *i.e.*, alleged derelictions in failing to keep proper program logs, failing to file certain time brokerage contracts with the Commission, and the facts and circumstances surrounding an acknowledged misrepresentation made by the station's manager to representatives of the Commission during a Commission investigation.[1]

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[1] As was recognized by the Commission and the Court, the station manager's misrepresentation was made completely without the knowledge or complicity of the station's stockholders, officers and directors. The station manager, in fact, made the same misrepresentation to his employer as was made to the Commission's

(Footnote one continued on next page)

These matters formed the basis for lengthy evidentiary hearings, as a result of which a Commission Hearing Examiner found that (1) the station's manager had misrepresented and concealed certain facts from the Commission's staff during an investigation, although the station manager's primary purpose in so doing was to mislead his employers as to the quality of his own performance, and the misrepresentation to the Commission was essentially an outgrowth of the manager's intent to mislead his employers; (2) the station had failed to timely file certain time brokerage contracts;[2] and (3) the licensee's principals had failed to exercise adequate control or supervision over the station's internal log keeping matters in a manner fully consistent with its responsibility as a licensee.

The Examiner concluded, however, that because (a) the principal officers, directors and stockholders of the licensee had not been guilty of knowing participation or compliance in the misrepresentation and misconduct of their station manager, (b) because they had *in fact* manifested an interest in, and concern for, the proper conduct of the station's affairs, and (c) because they had acted, although tardily, to correct the deficiencies

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(Footnote one continued from page 3)

investigators, and the primary purpose of the misrepresentation was to protect the station manager's *own* position vis-a-vis his employers. At no point did the station's principals condone the misrepresentation and, indeed, when they first became aware of it they immediately reported the full facts concerning it to the Commission.

[2] The Examiner recognized that the state of the law at that time was somewhat confused as to the precise definition of "brokerage contract," and that Petitioner had been informed by its counsel that its contracts need *not* be filed.

through the institution of more strict control devices, the Examiner recommended that the appropriate sanction to be applied, in light of the Commission's past precedents, was that the station's license should be renewed for a 1-year "probationary" period, rather than for a full three year term.

The matter was argued before the full Commission which, after adopting the Examiner's findings and his conclusions with respect to the acts of the station manager, reversed the Examiner's decision and concluded that the license renewal application should be denied because the manager's misconduct "must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibility as a licensee" (15 FCC 2d at p. 123).[3] In so concluding, the Commission refused to give any weight to the licensee's corrective measures and to the rehabilitative steps which it had taken to improve the station's performance when deficiencies were discovered. Further, the Commission completely refused to consider *at all* the programming performance of the station, even though Station WNJR proffered numerous examples of what it believed to be its outstanding record of public service in mitigation of the operational deficiencies upon which the Commission relied to deny the license renewal application.[4]

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[3] *Continental Broadcasting, Inc.* v. *Federal Communications Commission*, 15 FCC 2d 120 (1968).

[4] Prior to its initial Designation Order, the Commission fully reviewed Petitioner's application for renewal of license, which included an extensive programming showing, and found no deficiencies whatsoever with respect to the station's program performance. None of the designated issues related to the station's program offerings, and, indeed, the Commission's Broadcast Bureau

(Footnote four continued on next page)

Petitioner appealed the Commission's decision, urging that (a) the Commission had unjustly discriminated against Petitioner by refusing (without explanation) to give Petitioner credit for its rehabilitative actions, although it traditionally took such matters into consideration in the case of *other* licensees whose proven derelictions were far more serious than any which the Commission had found at WNJR, and (b) that the Commission further unjustly discriminated against Petitioner by utterly failing to consider in mitigation Station WNJR's total program performance, including its public service contributions, a factor which the Commission traditionally considers in the case of derelictions found in other licensees.

The Court of Appeals affirmed the Commission, rejecting Petitioner's main contentions:

> (a) In response to the contention that the Commission unjustly discriminated against Station WNJR, the Court held that the "choice of remedies and sanctions" is an area within which the Commission has broad discretion, and that the Commission is not (citing *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946)) bound "to deal

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(Footnote four continued from page five)

raised strenuous objection to including any public service showing in the record at the hearing precisely because the Commission had raised no question concerning the adequacy thereof. (Tr. 3516-17, 3520-22).

After the Commission's decision denying the license, Petitioner requested a Commission Rehearing and proffered numerous examples of its public service efforts and requested that this material be considered by the Commission in mitigation. The Commission refused to do so. See *Continental Broadcasting, Inc.*, 17 FCC 2d 485 (1969).

with all cases at all times as it has dealt with some that seem comparable" (Decision, Appendix A, *infra,* at p. A-7).

(b) With respect to the contention that the Commission failed to consider Station WNJR's program performance, the Court held that (i) the Commission need not consider "public service" rendered by a station where the licensee is disqualified by its attempts to deceive the Commission, and (ii) in any event, Petitioner lant made no offer of evidence until after the Commission had decided the case and, thus, the Commission was justified in concluding that the proffered evidence came too late. (*Id.* at p. 8)

REASONS FOR GRANTING THE WRIT

Petitioner respectfully urges that the Court of Appeals misconstrued the thrust of Petitioner's argument and, in so doing, allowed the Commission to improperly discriminate against Petitioner. The Commission's error in the instant case lay in its failure to meet the requirement which the Court of Appeals itself has recognized,[5] and which has repeatedly been recognized by the decisions of this Court,[6] that the Commission must act "in

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[5] See *Greater Boston Television Corp.* v. *Federal Communications Commission* ____F.2d____, _____, 20 Pike and Fischer Radio Regulation 2d 2052, 2065 (1970).

[6] See *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-74 (1886): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

furtherance of even-handed application of law, rather than impermissible whim, improper influence or misplaced zeal."[7]

The Court below was quite correct, of course, in holding that the choice of "remedies and sanctions" is an area in which the Commission traditionally has been allowed broad discretion. But the issue here is *not* the scope of the Commission's discretion in choosing an appropriate sanction. The issue is, rather, whether the Commission met the requirements of due process and equal protection by applying *uniform* standards of judgment to similarly situated licensees when faced with the task of assessing the appropriate remedy. The Commission's error in the instant case lay in the fact that it applied standards of judgment to Petitioner which it has consistently refused to apply to licensees in similar circumstances in the past and, perhaps more important, *which the Commission still does not apply to licensees even in cases which it is deciding this very day.* Put differently, the Commission cannot at one and the same time refuse to grant a license to A because of a violation of a particular standard of conduct, while at the very same time, and without any change in policy, grant licenses to B, C, and D, where B, C, and D engage in the same conduct as A. "An agency's view of what is in the public interest may change either with or without a change in circumstances," but whether changed or not, an agency must act "in furtherance *of even-handed application of law,* rather than impermissible whim, improper influence, or misplaced zeal." (*Greater Boston, supra,* ____ F.2d ___ , 20 Pike & Fischer Radio Regulation 2d at 2065, emphasis added.) This is the crux of the instant case.

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[7] See note 5, *supra.*

A. The Commission's Refusal to Consider the Licensee's Program Performance is Discriminatory.

The Commission's failure to consider any of Petitioner's programming evidence (and particularly its public service programming) is a flagrant example of the imposition of discriminatory standards. Petitioner filed voluminous program data demonstrating that it had been one of the first radio stations in the country devoted to serving the Negro community, and was one of the first to do so with blacks being hired at all programming levels.[8] Included in the program showing were communications from leading Newark black leaders, including statements from the National Association for the Advancement of Colored People, the New Jersey Commission Against Discrimination in Housing, the Southside High School of Newark, the Newark Senior Citizens Commission, and the Mayor and Deputy Mayor of Newark. The station also proffered a citation of commendation from the City of Newark for "outstanding meritorious service rendered to the Community." letters from the Mayor, businessmen, educators, government workers, the City of Newark Police Department, Board of Education, numerous churches, the YM and YWCA, Montclair State College, and others.

The Commission ignored this showing, stating that it need not consider any programming evidence where a licensee committed "gross misrepresentation and fraud"

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[8] The majority of the employees at Station WNJR are black. Those responsible for the programming are black. Of the air personnel, 9 out of 10 are black, including two supervisors of the announcing staff. Of 7 persons in supervisory positions in the station, 4 are black. The station has black personnel among its executives, salesmen, engineers and office personnel.

(17 FCC 2d at 489). The Court affirmed this judgment, holding that the Commission need not consider the "public service" rendered by a station where the licensee is disqualified because of misrepresentations. (Decision, Appendix A, at p. A-9.)

But in so holding the Court misconstrued the thrust of Petitioner's arguments. Conceding, *arguendo*, that the Commission need not, if it so desires, consider programming evidence of a licensee who has been found to have "misrepresented," nevertheless, it is a denial of due process for the Commission to *in fact* consider such evidence for certain licensees who have been found to have "misrepresented," while arbitrarily *refusing* to consider it for others who have been found to have so acted, *without ever explaining the reason for the inconsistent treatment.* Yet, this is precisely what the Commission has done in the instant case. There is no doubt that the Commission *traditionally* considers programming evidence as an element in determining the appropriate sanction to be imposed upon a licensee, even where "misrepresentations" have been proven, *and indeed it did so in the very case cited by the Court* (Decision, Appendix A, *infra*, at p. A-9).[9]

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[9] *Immaculate Conception Church of Los Angeles* v. *FCC*, 116 U.S. App. D.C. 73, 320 F.2d 795, *cert. denied*, 375 U.S. 904 (1963). In *Immaculate Conception Church*, the Hearing Examiner and the Commission did, in fact, consider evidence of programming presented by the licensee during the renewal period in weighing the sanction to be applied even though misrepresentations had been proven. The programming which it refused to take into consideration was that presented "while disposition of the KRLA renewal application was still in doubt," simply because such programming did not "provide any assurance that deceptive evidence would not subsequently be resumed by KRLA." See *Eleven Ten Broadcasting Corp.*, 33 FCC 92 at 97. The Commission in the instant case, however, refused even to consider appellant's programming record which was compiled *before* any doubt was raised as to its renewal.

For example:

1. In *Hall* v. *Federal Communications Commission,*[10] the licensee affirmatively and willfully misrepresented critical facts to the Commission. But the Court of Appeals indicated that the misrepresentation alone would *not* be sufficient grounds for disqualification. On the contrary, it was merely one facet which must be considered together with other aspects of the station's past record, *including its programming performance.*

2. In *Westinghouse Broadcasting Company,*[11] the Commission considered whether to renew Westinghouse's broadcast licenses after Westinghouse had been convicted of criminal price fixing and bid rigging. Westinghouse's misconduct in these areas had been so improper that the prosecuting Attorney General characterized it as involving "as serious instances of bid rigging and price fixing as have been charged in the more than half century of the Sherman Act." The Commission, however, in determining the effect of these admitted transgressions, placed great stress upon the record of broadcast performance which Westinghouse had compiled. The Commission weighed Westinghouse's serious transgressions in balance with the Company's programming contributions. It granted the renewals "because

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[10] 103 U.S. App. D.C. 248, 257 F.2d 626, 629 (1958).

[11] 22 Pike and Fischer Radio Regulation 1023 (1962).

of the outstanding nature of Westinghouse's contribution to the public interest in broadcasting" (22 Pike and Fischer Radio Regulation at 1029).

3. In *General Electric Co.*, 2 Pike and Fischer Radio Regulation 2d 1038 (1964), General Electric had been a co-conspirator with Westinghouse in the above described violations. Here again, however, the Commission considered as a criterion of judgment the nature of the Company's program contributions. The Commission actively reviewed the station's programming, found it to be "balanced," and characterized it as reflecting "cooperation with local civic and charitable organizations" (*Id.* at 1042). It found General Electric's record "constitutes clear evidence militating in favor of renewal of license; in this connection, we have also taken into account the great length of the General Electric broadcast record." (*Id.* at 1043). The Commission explained its rationale (*Id.* at 1044, emphasis added):

> We are confronted here, as we were with the Westinghouse renewals, by conflicting considerations—a most serious reflection on the applicant on the one hand *counterbalanced by a long history of broadcast service in the public interest on the other.*

4. In *The Northern Corporation*, 15 FCC 60, 5 RR 673 (1950) the Commission found that the licensee had filed erroneous ownership information. Recognizing that

the filing of accurate information is an essential element of licensee responsibility, the Commission nevertheless renewed the license after considering the licensee's entire record, noting that the station had furnished "a meritorious service to the Boston area and has become quite strongly imbedded in the community life in the area which it serves" (15 FCC at 82, 5 RR at 693). Ironically, the Commission in *The Northern Corporation* stressed precisely the type of integration into the community life which Petitioner unsuccessfully attempted to have the Commission consider in the instant case.

5. In *Ralph J. Silkwood* FCC 69 R-310, the Commission's Review Board underscored the Commission's long standing practice of considering programming evidence in mitigation: (emphasis added):

> The Commission has, in the past permitted the adduction of evidence as to past program record of licensees in renewal proceedings involving character qualification issues. *Such evidence is allowed on the theory that a meritorious program record may mitigate the significance of adverse findings under those issues.*

The above instances represent merely a few of the examples in which the Commission has followed its traditional policy of considering programming evidence in determining culpability. These cases, of course, were

decided prior to the Commission's decision in the instant case. But any notion that the Commission's decision here represented a change in policy is quickly dispelled by the fact that the Commission has continued to apply its traditional policy of weighing programming evidence in the balance, *even after its decision in the instant case.* Thus, in *Trans-America Broadcasting Corporation,*[12] the Commission was faced with a factual situation almost identical to that presented here. The licensee was found to have failed to timely file time brokerage contracts, failed to maintain control over the station's foreign language programming, and, most pertinently, to have deliberately attempted to conceal information from the Commission. Yet, the Commission's Hearing Examiner did not refuse to renew the license. He granted a 1-year renewal as an appropriate period in which to test the licensee's diligence. Most ironically, he did so solely on the grounds that the licensee's programming performance dictated this course of action.[13] In short, the Commission applied precisely the standards of judgment to the Trans-America licensee, and to the other licensees referred to above, which it inexplicably refused to apply to Petitioner.[14]

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12 20 Pike and Fischer Radio Regulation 2d 1095 (1970).

13 The Examiner stated that "it cannot be denied that its [the licensee's] program content, while it is to some extent conventionally commercial, does serve a variety of specialized groups whose needs are not ordinarily met. It would be good to continue KTYM and KTYM-FM if there could be assurance that the licensee would operate in compliance with the Commission's Rules, particularly in the area of control of foreign language programming and the keeping of logs." 20 Pike and Fischer Radio Regulation 2d at 1110.

14 In commenting on this point, the Court of Appeals held that Petitioner's proffer of programming evidence could be ignored because it "came too late," a position which the Commission had

(Footnote 14 continued on next page)

B. The Commission's Refusal to Consider the Licensee's Corrective Measures is Discriminatory.

The Commission's failure to give any weight to Petitioner's corrective action and rehabilitative conduct is an equally flagrant example of the use of discriminatory standards. The record was replete with uncontradicted evidence that Petitioner was at all times concerned that the Commission's Rules and Regulations were met, and took numerous affirmative steps by way of instituting control devices to attempt to insure compliance with its licensee responsibilities. Petitioner instituted extensive monitoring and audit procedures to check the operation of its facility and, immediately upon discovering any violations of Commission or station policy, moved to eradicate them.[15] With respect to the particular program

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urged in argument before it. Such a holding, however, makes a travesty of equitable procedure. As pointed out above, see Note 4 *supra,* Petitioner's application for renewal of license contained a full and complete programming showing. The Commission, after reviewing Petitioner's application, determined that its programming performance was satisfactory and designated no issue concerning the quality of that performance. Indeed, the Commission's Counsel bitterly objected to any attempt to introduce programming evidence into the record. (Tr. 3516-17, 3520-22). Thus, the reason for the absence of program evidence lay not in Petitioner's failure to proffer it in timely fashion, but rather because the Commission initially found that performance to be satisfactory. The Commission's error was that, unbeknownst to Petitioner, and directly contrary to the precedents cited above, the Commission thereafter refused to place in the balance the fact that it initally found the station's program performance to be satisfactory.

[15] Indeed, the Examiner pointed out that the licensee was "unceasing in his efforts to correct these discrepencies" despite employee resentment of the licensee's "unremitting criticism." (See Continental Broadcasting, Inc., 15 FCC 2d 236, 242).

on which most of these discrepancies were found ("Celebrity Time"), the undisputed record reveals that as a result of a personal audit by Petitioner's home office, Petitioner's principals became aware of these deficiences and immediately demanded that they be eradicated, and most were.

Finally, when Petitioner's principals became aware that their station manager had lied not only to them but to the Commission as well, Petitioner immediately made complete disclosure of all of the facts to the Commission and fully cooperated with the Commission, turning over, without being requested to do so, its extensive monitoring data and internal correspondence.[16]

None of these demonstrated rehabilitative achievements was given any credence or weight by the Commission. As far as the Commission's decision in this case is concerned, it was irrelevant that the licensee took rehabilitative steps and constantly attempted to improve its performance. But, the Commission has never before taken such a cavalier and indifferent attitude towards a licensee's rehabilitative and corrective efforts. On the contrary:

1. In *Westinghouse, supra,* the Commission was required to consider whether a broadcast licensee with a demonstrated record of violations of Federal statutes could be relied upon to effectuate its promises and fulfill its responsibilities as a

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[16] Ironically, this monitoring data and correspondence formed the basis of the Commission's case concerning technical deficiencies.

broadcast licensee. In making this determination, the Commission placed substantial weight upon new compliance procedures which Westinghouse had undertaken to avoid a repetion of the antitrust violation. Indeed, Westinghouse's rehabilitative efforts, relied upon by the Commission, stressed greater surveillance and more intensive internal education procedures *in the future*. Similarly, in *General Electric, supra*, the Commission used as a standard of judgment General Electric's *mere promises* to institute a new organizational structure, and future internal education and surveillance. Westinghouse and General Electric did not even demonstrate, as Petitioner did here, a *past* record of improved rehabilitative efforts.

2. In *Lamar Life Broadcasting Company*, 14 FCC 2d 431, 13 RR 2d 769 (1968)[17] the licensee was found to have engaged in blatantly racist programming, insulting the station's Negro audience, and flatly ignoring the needs of Negroes within its service area. Nevertheless, in granting a renewal of license to the station, the Commission placed primary emphasis on the fact that the licensee had begun corrective action and had taken rehabilitative efforts to avoid a recurrence of the incidents.

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[17] Reversed on other grounds, *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 138 U.S. App. D.C. 112, 425 F.2d 543, 16 Pike and Fischer Radio Regulation 2d 2095 (1969).

3. The Commission policy with respect to considering rehabilitative efforts was first enunciated almost 30 years ago in *Panama City Broadcasting Co. (WDLP),* 9 FCC 208 (1942), where the record indicated that the licensee had "grossly misled" the Commission, not because the licensee's principal officer was himself purposely deceitful, but because his agents had allowed the Commission to be deceived. The Commission, in refusing to disqualify the *Panama City* licensee, placed primary emphasis upon its rehabilitative conduct. In language which so closely fits the facts in the instant case that it could have been written for it, the Commission pointed out (9 FCC at 218):

> Further evidence of Mr. Perry's good faith may be seen in his conduct from the time he discovered that he had been misled by bad advice and began to discover what improper acts had been committed in his name . . . he voluntarily filed an affidavit with the Commission making a substantial disclosure to the Commission for the first time what the true facts were in the case; and, from the time he learned of the Commission's investigation, he and his counsel and employees in the main cooperated with the Commission's staff in obtaining for the Commission full information

about the history of the application.

Petitioner here carried out the very same rehabilitative conduct as did the licensee in *Panama City*, but the Commission refused even to consider Petitioner's efforts.

Moreover, even after the Commission's decision in the instant case, the Commission has repeatedly used the criterion of rehabilitative conduct to assess the sanction to be applied for licensee irregularities. Thus, in *Howard W. Davis,*[18] the Commission found that the licensee repeatedly violated the Commission's Rules. Moreover, in reponse to numerous official notices of violation, the licensee was evasive in his responses, prompting the Commission conclusion that he was primarily concerned "with obscuring his own procrastination."[19] Yet, both of Davis' operating licenses were renewed, the Commission choosing the lesser sanction of $10,000 forfeiture for each station. More pertinent, the Commission did so precisely in reliance upon Davis' rehabilitive conduct which, the Commission pointed out, belatedly brought Davis' stations into compliance with the Commission's Rules.[20] In sum, the Commission in *Davis* followed its traditional policy of taking into consideration rehabilitative conduct before choosing the appropriate sanction, while it totally ignored Petitioner's rehabilitative conduct in the instant matter. No explanation has ever been forthcoming from the Commission as to why it deserted its traditional standards in the instant case.

The importance of the instant case goes far beyond the loss to the public of a unique and pioneering

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18 27 FCC 2d 102 (1971).

19 27 FCC 2d at 107.

20 27 FCC 2d at 107.

broadcast service which has fulfilled the broadcast needs of the black community in Newark for over 16 years. Nor can its significance be judged merely in the context of a valuable broadcast franchise being ended by the whim or caprice of the Commission. The Commission's action here goes to the heart of the principle of equality which underlies administrative jurisprudence. Although Congress has reposed broad discretionary powers in Federal agencies, nevertheless, the due process and equal protection concepts embodied in the Fifth and Fourteenth Amendments require that these powers be exercised in a fair, equitable and uniform manner. No Federal Commission can be allowed to pick and choose among its standards of judgment, applying certain criteria to large and powerful institutions (such as Westinghouse and General Electric in the cases cited above) and ignoring those very same principles in assessing conduct of other licensees, without ever explaining the reasons for the differences in treatment. If, as we have shown above, the Commission has traditionally used criteria of past program performance and evidence of past rehabilitative conduct in weighing applications of licensees whose operations have been found lacking in certain particulars, the Commission cannot suddenly and without explanation refuse to apply these criteria to Petitioner. To allow them to do so, would be to substitute the chancellor's foot for even-handed justice.

The principle of uniform application of criteria was eloquently stated by the Supreme Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to

> their rights, the denial of equal justice is still within the prohibition of the Constitution.

This principle was reemphasized in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942):

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . , it has made as invidious a discrimination as if it selected a particular race or nationality for oppressive treatment.

These principles have become familiar in criminal law and civil rights litigation. They apply, of course, as fully to administrative law, and administrative practice, as to the criminal and civil law areas. Although the Court has had few occasions to stress their applicability with respect to Federal administrative agencies, the instant case, Petitioner submits, is an instance wherein the Federal Communications Commission has failed to do its duty of even-handed justice. Petitioner believes that the principle underlying the instant case must be emphatically reaffirmed by this Court so that the public may be assured that the trust which the public has traditionally reposed in administrative agencies is not abused.

Whereas, in view of the above, Petitioner respectfully submits that a *writ of certiorari* should issue.

Respectfully submitted

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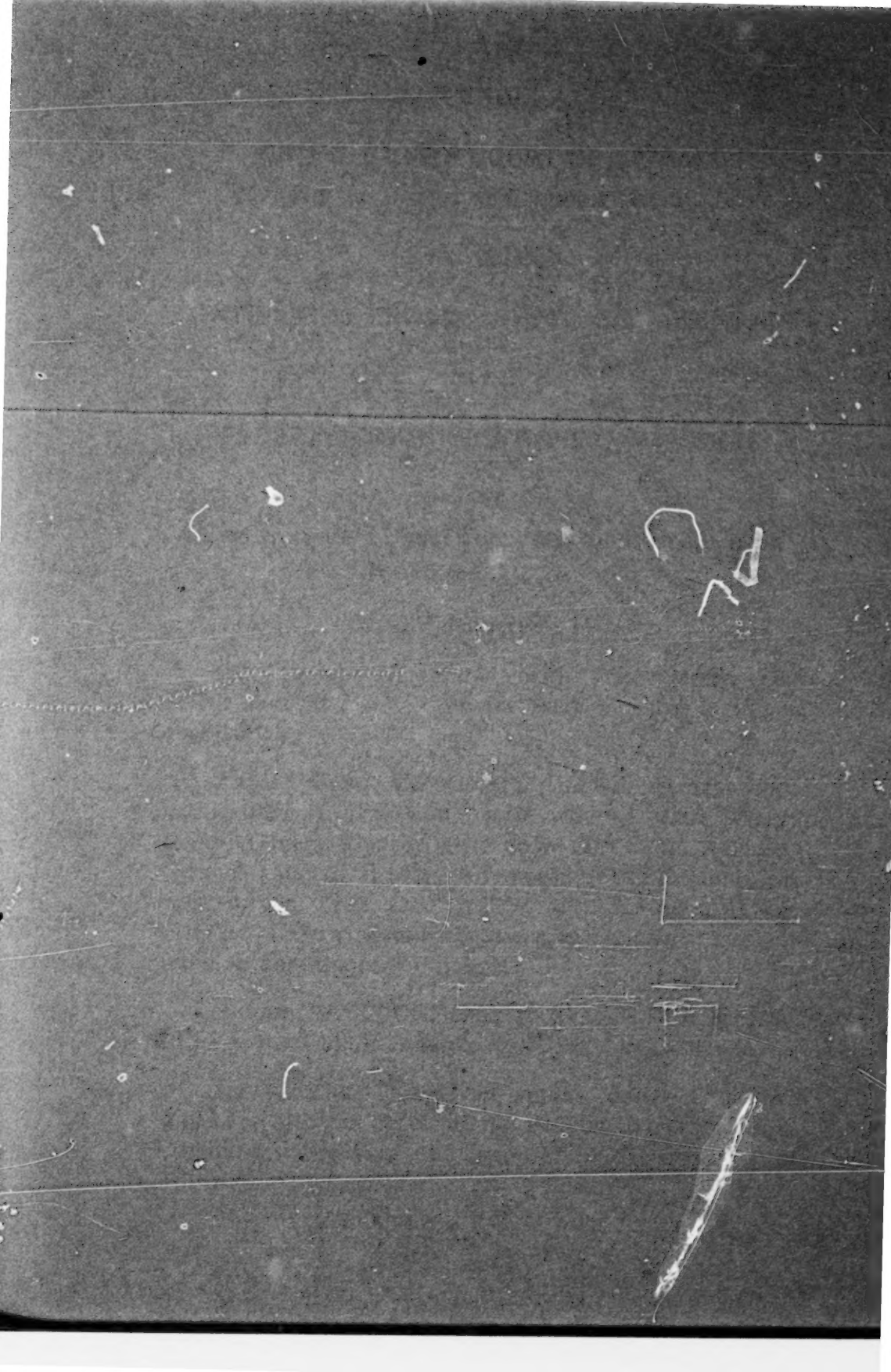
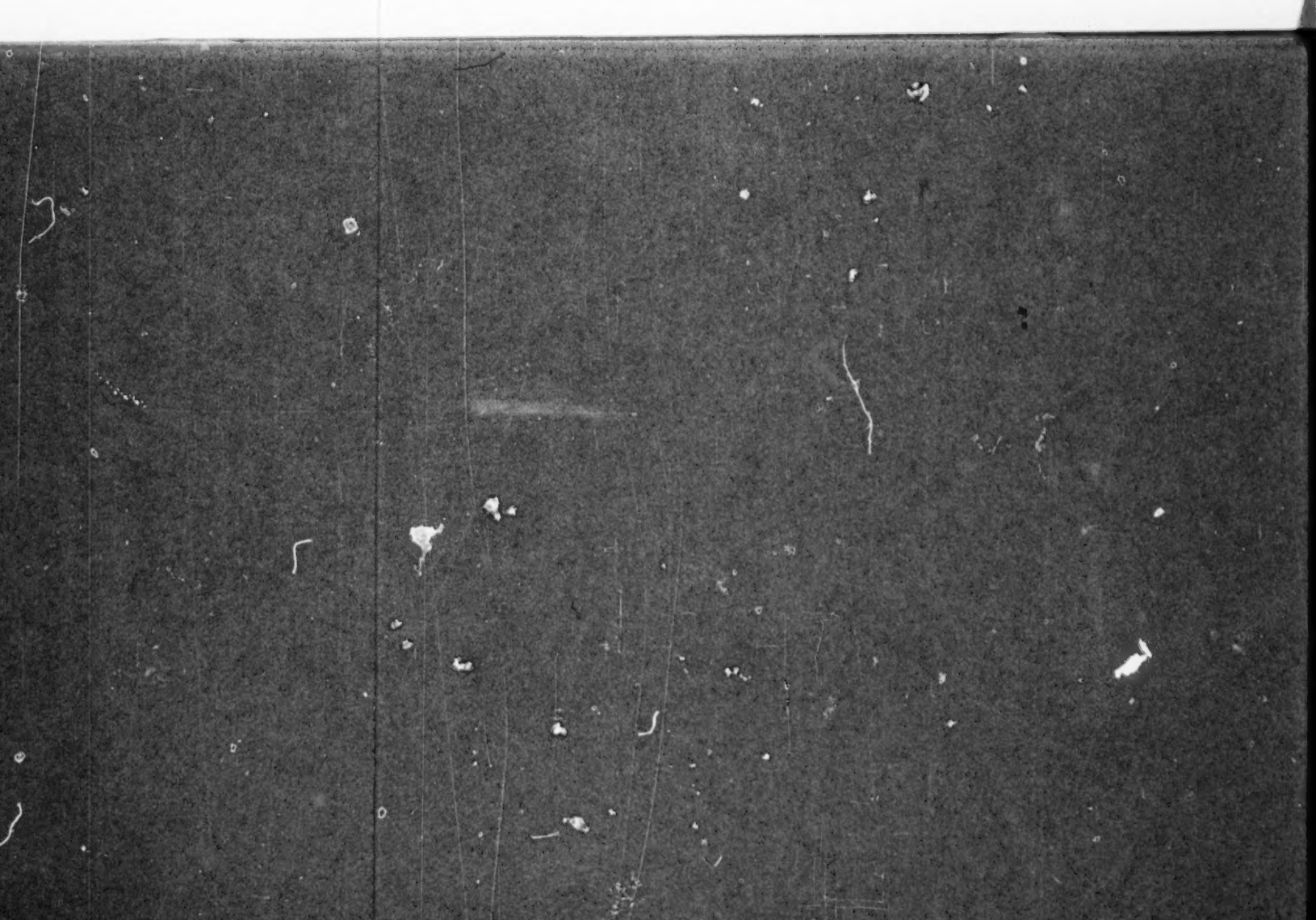
April 19, 1971





APPENDIX A

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 23,099

CONTINENTAL BROADCASTING, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeal from the Federal Communications Commission

Decided January 5, 1971

Mr. Leonard H. Marks, with whom *Messrs. Paul Dobin* and *Martin J. Gaynes* were on the brief, for appellant.

Mr. D. Biard MacGuineas, Counsel, Federal Communications Commission, with whom *Messrs. Henry Geller,* General Counsel, and *John H. Conlin,* Associate General Counsel, Federal Communications Commission, were on the brief, for appellee. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before: BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and ROBB, *Circuit Judge.*

Per Curiam: This is an appeal, under 47 U.S.C. §402 (b)(2), from orders of the Federal Communications Commission denying the application for renewal of

license of station WNJR, Newark, New Jersey. The license for station WNJR is held by Continental Broadcasting, Inc., a wholly owned subsidiary of Rollins, Inc. The home office of the company is in Wilmington, Delaware. The license was last renewed on February 8, 1961.

In 1963 and 1964 the Commission and its staff investigated the operation of WNJR. The investigation related to alleged derelictions of the station in failing to keep proper program logs and in failing to file with the Commission time brokerage contracts, as required by the Commission rules (47 C.F.R. §§1.613(c), 73.111, 73.112 (1970)). In particular the investigation focused on a program known as "Celebrity Time" which was broadcast over WNJR Monday through Saturday, from 11:00 P.M. to midnight, from the fall of 1957 until March 1963. On this program "rock and roll" records were played, interspersed with spot advertisements and occasional interviews by a "disc jockey" with "guest celebrities". "Celebrity Time" was produced by an independent advertising agency known as Celebrity Consultants.

Following its investigation the Commission on June 10, 1965 designated WNJR's renewal application for evidentiary hearing on the following issues:

> "1. To determine whether in its written response to the Commission's notice of apparent liability or in its oral statements to the Commission's staff the applicant misrepresented facts to the Commission and/or was lacking in candor;*

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*A notice of apparent liability for forfeiture in the amount of $1,000, based on allegation of failure to file copies of a time brokerage contract with the Commission within 30 days of execu-

(Footnote continued on next page)

"2. To determine whether the applicant falsely represented to the Commission or its staff that the 139 'contracts' submitted to the Commission's staff during the course of an investigation of WNJR were, in fact, the actual documents which the applicant allegedly required Celebrity Consultants to file with WNJR on behalf of each sponsor who advertised during 'Celebrity Time'; or whether such 'contracts' were falsified in order to conceal or misrepresent the actual facts with respect to the relationship which existed during the period of the latest renewal and up to the present, between the applicant, its employees and Celebrity Consultants.

"3. To determine whether the principals of the applicant have exercised adequate control of supervision over the operation of WNJR in a manner consistent with the applicant's responsibility during the period of the applicant's most recent license renewal [on February 8, 1961] and up to the present; [footnote omitted]

"4. To determine whether the applicant operated its station contrary to and/or inconsistent with the provisions of section 317(a)(1) and (c) of the Communications Act and sections 73.111, 73.112, and 73.119 of the

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(Footnote continued from page A-2)

tion thereof in violation of sec. 1.613(c) of the rules, was transmitted to the licensee of station WNJR on Jan. 22, 1964. The licensee filed a response and opposition to the notice on Mar. 16, 1964. By a letter dated June 24, 1964, Continental withdrew its response and opposition and also submitted a check in full payment of the forfeiture.

Commission's rules [pertaining to sponsorship identification and maintenance of program logs];

"5. To determine whether the applicant failed to file certain agreements regarding the sale of time periods to time brokers in violation of section 1.613(c) of the Commission's rules;

"6. To determine whether, in light of the evidence adduced under the foregoing issues, the applicant has reflected the necessary qualifications to continue to be the licensee of station WNJR;

"7. To determine whether a grant of the above-captioned application would serve the public interest, convenience, and necessity."

After lengthy hearings reported in somewhat over 6800 pages of transcript the examiner filed his initial decision. The decision occupies 113 pages in the printed record; 83 pages are devoted to detailed findings of fact. The examiner found and concluded that (1) during the investigation of WNJR by the Commission's staff the station manager had submitted to the staff 139 spurious documents which he represented to be genuine contracts for advertising on the Celebrity Time program; (2) these documents had been prepared at the direction of the manager in order to conceal facts material to the investigation; (3) over a period of many months WNJR had failed to maintain proper and accurate program logs and the licensee had been aware of this failure; (4) the licensee had failed to file time brokerage contracts with the Commission, in violation of the Commission's rules; and (5) the licensee's principals had failed to exercise adequate control or supervision over the station in a manner consistent with the licensee's responsibility.

Summarizing his findings the examiner referred to station WNJR as an "Augean stable".

The examiner found, however, that the principal officers of the licensee had not been guilty of knowing participation in the misrepresentations and misconduct of their station manager, that they had manifested an interest in and concern for the proper conduct of the station's affairs, and that they had "tardily acted to clear the Augean stable". Accordingly, the examiner recommended that the station's license be renewed for a one-year "probationary" period rather than the normal three-year term.

Continental filed no exception to the examiner's findings and conclusions. The Commission's broadcast bureau did file exceptions, urging that the application for renewal be denied.

After oral argument the Commission in its decision adopted the conclusions of the hearing examiner with respect to the misconduct and fraudulent acts of the station manager. The Commission concluded further "that the manager's gross misconduct and fraud on the Commission must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee." (15 F.C.C.2d at 123). Finally the Commission concluded:

> "The facts as found in this case are irreconcilable with a public interest finding. We have carefully examined the entire record in this proceeding, and we are unable to find any mitigating circumstances which would justify a grant of a renewal of license even for a period of 1 year. While nonrenewal of the license is a severe sanction, we have reached this decision

> only after a through consideration of the entire fact situation. See *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946)."

15 F.C.C.2d at 131.

The application for renewal of license was denied.

Continental filed a petition for reconsideration of the Commission's decision, requesting (1) that the Commission adopt the recommendation of the hearing examiner that the license be renewed for one year, or in the alternative (2) that the record be reopened to consider information bearing on the performance of station WNJR. The petition was denied.[1]

Since the examiner's findings of misconduct and fraud, which were adopted by the Commission, are not challenged by Continental, it is unnecessary to trace the threads of the tangled web of facts and circumstances which the examiner described in his decision. Given these findings our only task is "to see whether the Commission's judgment, based on the record as a whole, is reasonable and within its proper discretion." *Kidd* v. *F.C.C.*, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962). *See also Lorain Journal Company* v. *F.C.C.*, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966); *KWK Radio, Inc.* v. *F.C.C.*, 119 U.S. App. D.C. 144, 337 F.3d 540 (1964), *cert. denied*, 380 U.S. 910 (1965). As the Supreme Court put it in *F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), "* * * it is the Commission, not the courts, which must be satisfied

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[1] See the Examiner Initial Decision, 15 F.C.C.2d 133-246 (1967); the Commission's Decision, 15 F.C.C.2d 120-132 (1968); the Commission's Memorandum Opinion and order denying petition for reconsideration and rehearing, 17 F.C.C. 2d 485-490 (1969).

that the public interest will be served by renewing a license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." Viewing the record in this light we think the Commission acted reasonably and within its discretion in finding that renewal of Continental's license would not be in the public interest.

Continental attacks the Commission's decision on several grounds. First, it argues that the Commission acted arbitrarily by imposing the "ultimate sanction" of refusal to renew the license. We are told that in comparable cases the Commission has applied milder sanctions by way of fines or short-term licenses; and it follows, says Continental, that the Commission in this case has abused its discretion by ignoring its own standards. We have made it plain in the past, however, that "the choice of remedies and sanctions is a matter wherein the Commission has broad discretion." *Lorain Journal Company* v. *F.C.C.*, 122 U.S. App. D.C. 127, 134, 351 F.2d 824, 831 (1965), *cert. denied*, 383 U.S. 967 (1966). Here the Commission has exercised its discretion on the basis of undisputed facts. As the Supreme Court said in the *WOKO* case, 329 U.S. 223, 228 (1946), "we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

In support of its contention that the Commission has arbitrarily invoked against station WNJR a standard different from that applied to other licensees, Continental cites *Melody Music Inc.* v. *F.C.C.*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965). In that case the Commission considered two renewal applications at virtually the same time. In each case the Commission found that there had been misconduct in broadcasting a deceptive television

quiz program; yet one applicant was held disqualified and the other was not. We order the Commission to explain its reasons for distinguishing between the two applicants. We think that on its facts the *Melody Music* case is not in point here, for here there is no close parallel or relationship between the facts and the issues presented and any other case. On the other hand, denial of an application for renewal of a broadcast license because of misrepresentation to the Commission is by no means a novel sanction. *See., e.g., F.C.C.* v. *WOKO*, 329 U.S. 223 (1946); *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 116 U.S. App. D.C. 73, 320 F.2d 795, *cert. denied,* 375 U.S. 904 (1963); *KWK Radio, Inc.* v. *F.C.C.*, 119 U.S. App. D.C. 144, 337 F.2d 540 (1964), *cert. denied,* 380 U.S. 910 (1965); *Lorain Journal Company* v. *F.C.C.*, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966).

Continental argues further that the Commission erred by failing to give adequate weight to the licensee's "corrective measures" and "rehabilitative steps to correct deficiencies in the operation of station WNJR, when those deficiencies were discovered." The record discloses, however, that the Commission did carefully consider the examiner's finding (15 F.C.C.2d at 234-236) that the licensee had instituted a number of control procedures for its stations. (See Commission Decision, 15 F.C.C.2d at 126, 127; Commission's Memorandum Opinion and Order, 17 F.C.C.2d at 486, 487). The Commission in its decision pointed out that the examiner had concluded, and Continental had taken no exception to his conclusion, that the licensee did not exercise adequate control or supervision over the operation of station WNJR in a manner consistent with its licensee responsibilities. The Comission thought that such a lack of supervision and control demonstrated intolerable irresponsibility. We cannot say that the Commission's conclusion is without rational support in the record.

Finally, Continental argues that in weighing the qualifications of station WNJR the Commission improperly failed to consider the station's program performance. A short answer to this contention is that the Commission "need not consider the public service rendered by a station where the licensee is disqualified by its attempts to deceive the Commission." *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 116 U.S. App. D.C. 73, 75, 320 F.2d 795, 797, *cert. denied*, 375 U.S. 904 (1963). Moreover, the record discloses that Continental made no offer of evidence of programming until after the Commission had decided the case; on the contrary, in response to a question from the examiner, counsel for WNJR stated that he did not intend to make any "program showing" by way of mitigation, that the "question of actual programming was not in issue." See 17 F.C.C.2d at 488. The matter of programming was raised for the first time when Continental moved to reopen the record after the Commission's decision. The Commission was justified in concluding that the proffer of evidence came too late. *See Colorado Radio Corp.* v. *F.C.C.*, 73 U.S. App. D.C. 225, 118 F.2d 24 (1941).

The decision of the Commission is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,099 September Term, 1970.

Continental Broadcasting, Inc.,
Appellant Filed Jan 5, 1971

v.

Federal Communications Commission

Appeal from the Federal Communications Commission

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Robb, Circuit Judge.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the decision of the Federal Communications Commission appealed from herein is hereby affirmed.

Per Curiam
For the Court:

Nathan J. Paulson
Clerk

Dated: January 5, 1971

Opinion per curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,099 September Term, 1970

Continental Broadcasting, Inc.,
Appellant

v. Filed Feb 10, 1971

Federal Communications Commission

Before: Bazelon, Chief Judge; Wilbur K. Miller, Senior Circuit Judge and Robb, Circuit Judge.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ N. J. Paulson
NATHAN J. PAULSON
Clerk

APPENDIX D

The Constitution

AMENDMENT V

No person shall *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.